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IN THE

Supreme Court Of The United States

October Term, 1984

NO.

EARL BERNARD WILLIAMS ..... *Petitioner*

VS.

STATE OF ARKANSAS ..... *Respondent*

ON PETITION FOR WRIT OF CERTIORARI TO THE ARKANSAS COURT OF APPEALS AND THE SUPREME COURT OF ARKANSAS

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QUESTION PRESENTED

Whether a criminal defendant's Fourth Amendment rights are violated when his request for disclosure of a confidential informant is denied, when the informant's statements led to issuance of the search warrant, the defendant contested statements attributed to the informant, and submitted that disclosure of the identify of the informant was necessary to a litigation of the totality of the circumstances.

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Petitioner, Earl Bernard Williams, a person sentenced to imprisonment in the State of Arkansas (although, as of the preparation of this Petition, free on appeal bond) petitions for a writ of certiorari to review his conviction for Possession of a Controlled Substance and revocation of suspended sentence and the affirmance thereof by the Arkansas Court of Appeals and the Supreme Court of Arkansas.

OPINION BELOW

The written opinion of the Arkansas Court of Appeals, the intermediate appellate court of Arkansas,

is reported as *Williams v. State*, 14 Ark. App. 32, 684 S.W.2d 821 (1985). Petitioner sought review by the Supreme Court of Arkansas, discretionary in cases of this type, which was denied without written opinion. The opinion of the Arkansas Court of Appeals, as well as the letter from the Arkansas Supreme Court Clerk reporting denial of the Petition for Review, are reproduced in the Appendix.

JURISDICTION

The decision of the Arkansas Court of Appeals was issued on February 20, 1985. The Arkansas Supreme Court denied review on May 13, 1985. This Court's Jurisdiction is invoked under 28 U.S.C. 1257 (3), with Petitioner asserting a deprivation of rights secured by the Constitution of the United States.

CONSTITUTIONAL PROVISIONS, STATUTES AND RULES INVOLVED

Fourth Amendment, United States Constitution:

The right of the people to be secure in their persons, houses, papers and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

Fourteenth Amendment, United States Constitution:

. . . (N)or shall any state deprive any person of life, liberty, or property without due process of law . . .

Ark. Stat. Ann. 82-2617:

(a) Except as authorized by this Act it is unlawful for any person to manufacture, deliver, or possess with intent to manufacture or deliver, a controlled substance:

(1) Any person who violates this subsection with respect to: . . . . (iv) A controlled substance classified in Schedule VI shall be (a) imprisoned for no less than four (4) nor more than ten (10) years and/or fined no more than twenty-five thousand dollars ($25,000) if the quantity of the substance is less than ten pounds . . . .

Rule 509, Arkansas Uniform Rules of Evidence:

(a) Rule of Privilege. The United States or a state or subdivision thereof has a privilege to refuse to disclose the identity of a person who has furnished information relating to or assisting in an investigation of a possible violation of a law to a law enforcement officer or member of a legislative committee or its staff conducting an investigation.

(b) Who May Claim. The privilege may be claimed by an appropriate representative of the public entity to which the information was furnished.

(c) Exceptions:

(1) Voluntary disclosure; informer a witness. No privilege exists under this rule if the identity of the informer or his interest in the subject matter of his communication has been disclosed to those who would have cause to resent the communication by a holder of

the privilege or by the informer's own action, or if the informer appears as a witness for the government.

(2) Testimony on relevant issue. If it appears in the case that an informer may be able to give testimony relevant to any issue in a criminal case or to a fair determination of a material issue on the merits in a civil case to which a public entity is a party, and the informed public entity invokes the privilege, the court shall give the public entity an opportunity to show in camera facts relevant to determining whether the informer can, in fact, supply that testimony. The showing will ordinarily be in the form of affidavits, but the court may direct that testimony be taken if it finds that the matter cannot be resolved satisfactorily upon affidavit. If the court finds there is a reasonable probability that the informer can give the testimony, and the public entity elects not to disclose his identity, in criminal cases the court on motion of the defendant or on its own motion shall grant appropriate relief, which may include one or more of the following: requiring the prosecuting attorney to comply, granting the defendant additional time or a continuance, relieving the defendant from making disclosures otherwise required of him, prohibiting the prosecuting attorney from introducing specified evidence, and dismissing charges. In civil cases, the court may make any order the interests of justice require. Evidence submitted to court shall be sealed and preserved to be made available to the appellate court in the event of an appeal, and the contents shall not otherwise be revealed without consent of the informed public entity. All counsel and parties are permitted to be present at every stage of proceedings under this subdivision except a

showing in camera at which no counsel or party shall be permitted to be present.

STATEMENT OF THE CASE

On June 24, 1983, Petitioner was given a four-year suspended sentence in the Circuit Court of Pulaski County, Arkansas upon a conviction for Possession of Marijuana with Intent to Deliver (Ark. Stat. Ann. 82-2617). On August 25, 1983, Petitioner was again arrested when pursuant to a search warrant, officers of the Little Rock Police Department entered a residence in which Petitioner was found. Petitioner was charged with the new offense, and revocation of the suspended sentence was sought.

Petitioner filed motions for discovery and for suppression of evidence, disputing the allegations, attributed by the affiant to condifential informant, that Petitioner lived in the house and was selling marijuana there. Petitioner sought disclosure of the identity of the confidential informant in order to fully litigate the issue of the validity of the search warrant and the credibility of the informant. The motions were denied, and at trial on Aprial 13, 1984, Petitioner was convicted and sentenced to terms of four years to run concurrent, for both the August charge and the revocation of the suspended sentence.

Petitioner appealed to the Arkansas Court of Appeals, and his conviction was affirmed. After

affirmance by the Court of Appeals and the 17 days normally required to file a Petition for Review with the Arkansas Supreme Court, Petitioner discharged his trial and appellate counsel and hired current counsel. Current counsel filed a Petition for Review and to the Arkansas Supreme Court seeking the discretionary review permitted by that Court, and also lodged with this Court an Application for Extension of Time. This Court's Clerk responded on April 30 that the time would not begin to run until denial of relief by the highest court of Arkansas. That denial was on May 13, 1985. Copies of the correspondence are included in the Appendix.

REASON FOR GRANTING THE WRIT

THE DENIAL OF DISCLOSURE OF THE IDENTITY OF THE CONFIDENTIAL INFORMANT, WHEN THE INFORMANT'S STATEMENTS ARE USED BY THE POLICE TO OBTAIN A WARRANT, AND THE DEFENDANT DISPUTES THE VERACITY OF THE STATEMENTS ATTRIBUTED TO THE INFORMANT, DENIES THE DEFENDANT THE ABILITY TO LITIGATE THE TOTALITY OF THE CIRCUMSTANCES TEST UNDER THE FOURTH AMENDMENT, AS ENUNCIATED IN *ILLINOIS V. GATES.*

This case affords the Court an opportunity to delineate the circumstances in which an informant's identity should be disclosed in order to litigate the totality of the circumstances of the issuance of a search warrant and the resulting seizure and arrest.

In *Illinois v. Gates,* 103 S.Ct. 2317 (1983), whose rationale was reiterated in *Massachusetts v. Upton,* 104 S.Ct. 2085 (1984), this Court announced a test for issuance of search warrants involving a common sense determination from a "totality of the circumstances." The existing *Aguilar-Spinelli* tests were superseded by what was regarded as a simpler, less convoluted analysis. *Gates* involved a confidential informant, identity not known, whose assertions were confirmed by independent observation and apparently stating facts, though innocent in nature, not seriously contested by the defendant.

The trial judge in the case at bar attempted to apply the *Gates* test, and did not reach the Arkansas informant disclosure procedure, Rule 509 Arkansas Uniform Rules of Evidence. Even before the taking of testimony she ruled as follows:

> THE COURT: As to the disclosure of the informant's identity, I don't see that he is a percipient (sic) witness and I don't see that that's necessary. As to the question of reliability in order for the magistrate to issue the search warrant, was there any transcript made—okay, there was no transcript.
>
> MR. MONTGOMERY (Prosecutor): Your Honor, I would point out that it is the State's position that a transcript is only required if additional testimony is taken at the time the affidavit is presented to the magistrate.
>
> THE COURT: Well, all I'm saying is that I think that this is a matter that goes to the motion to (T. 51) suppress whether under the totality of the circumstances the search warrant was issued properly based upon probable cause. I think that goes to the motion to suppress. And the testimony that will be presented by the police officer concerning his knowledge of the reliability of the informant to what I am saying is I don't think that the information that you have requested is absolutely necessary in order for the Court to, by your cross examination, evaluate whether under the totality of the circumstances there is reliable information. As you know, the test has changed. It is

not two-pronged any more. It is the totality of the circumstances. So, for those reasons I will deny your motion. (T. 52)

But the facts of this are substantially different and Petitioner's Fourth Amendment rights were violated by his inability to confront the informant as part of the "totality of the circumstances." Although on entrance to the residence the police found Petitioner in close proximity to a substantial amount of marijuana, the entry was pursuant to a warrant issued as a result of statements by a confidential informant to the affiant policeman that Petitioner lived at the residence and was selling marijuana. In other words, Petitioner's position is that the informant—if he indeed made the allegations, was either lying or mistaken.

The Arkansas Court of Appeals essentially missed the point Petitioner was trying to make, instead holding that the evidence from the search itself was sufficient to sustain the conviction. The court cited an Arkansas case standing in the proposition that the informant need not be disclosed when he or she was not a witness to the actual crime eventually charged. *Jackson v. State,* 283 Ark. 301 675 S.W.2d 820 (1984).

This reasoning, if permitted to stand, would vitiate the "totality of the circumstances" test. The issue vis-a-vis the warrant requirement is not what the eventual charge is, but what the circumstances leading to the warrant's issuance are, *Gates* replaced *Aguilar-Spinelli,* not with no test at all, but rather with merely a less rigidly codified analysis. The trial court

should nonetheless be required to make the analysis; moreover, an analysis is basically meaningless if the defendant is denied the right to present evidence, by way of confrontation, that untruths were used in obtaining of the warrant. The Fourth Amendment would be devoid of meaning.

It is to the benefit of all parties for the Court to clarify the relationship of the *Gates* rules to informants, when the informant's factual allegations are directly disputed. This Court dismissed as improvidently granted a writ of certiorari in *Colorado v. Nunez*, 104 S.Ct. 1257 (1984) where this issue would have been confronted. Arkansas had adopted the *Gates* test, in *Thompson v. State*, 280 Ark. 265, 658 S.W.2d 350 (1983). There were therefore no independent state grounds, such as were applicable in *Nunez* and causing dismissal of the writ there.

CONCLUSION

The petition for writ of certiorari should be granted and the holding of the Arkansas court reversed. The Court should set this matter for oral argument on the issues as outlined above.

Respectfully submitted,

DARRELL F. BROWN & ASSOCIATES, P.A.
Attorneys at Law
One Union National Plaza, Suite 940
Little Rock, Arkansas 72201
(501) 376-1845

By: /s/Darrell F. Brown
Darrell F. Brown

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on Mr. Steve Clark, Attorney General, Justice Building, Little Rock, Arkansas 72201, by placing same, properly addressed, in the United States Mail with sufficient postage to insure delivery this 9th day of July, 1985.

Darrell F. Brown

APPENDIX

Office of The Clerk
Supreme Court of The State of Arkansas
Arkansas Court of Appeals
Little Rock

Dona L. Williams
Clerk

Robin Henthorne
Chief Deputy

May 13, 1985

Darrell F. Brown
Attorney at Law
One Union National Plaza, Suite 940
Little Rock, AR. 72201

Re: Earl Barnard Williams
v. State of Arkansas

Dear Mr. Brown:

The Court made the following order in the above styled case today:

"Appellant's motion for permission to file a belated Petition for Review is denied."

Sincerely yours,

Dona L. Williams, Clerk

DLW:rh

cc: Theodore Holder
Jacque Alexander

LAW OR CHANCERY MANDATE

State of Arkansas, SS
In the Court of Appeals

BE IT REMEMBERED. That at a session of the Court of Appeals of the State of Arkansas, begun and held in the city of Little Rock, on the 1st day of May, 1985, amongst others were the following proceedings, to-wit:

EARL BERNARD WILLIAMS
Appellant

vs. No. CACR 84-124
STATE OF ARKANSAS
Appellee

Appeal from Pulaski Circuit Court
Fifth District
(Your Nos. CR83-677 & 83-2211)

Appellant's motion to remain on bond pending Petition for Review and Petition for Writ of Certiorari is granted.

IN TESTIMONY, That the above is a true copy of said Court of Appeals, rendered in the case therein

stated. I, DONA L. WILLIAMS, Clerk of said Court of Appeals, hereunto set my hand and affix the Seal of said Court of Appeals, at my office in the City of Little Rock, this 1st day of May, A.D., 1985.

/s/Dona L. Williams
CLERK

SUPREME COURT OF THE UNITED STATES
OFFICE OF THE CLERK
WASHINGTON, D.C. 20543

April 30, 1985

Darrell F. Brown, Esquire
DARRELL F. BROWN & ASSOCIATES, P.A.
One Union National Plaza
Suite 940
Little Rock, Ar. 72201

Re: Earl Barnard Williams v. Arkansas

Dear Mr. Brown:

Your application for an extension of time within which to file a petition for a writ of certiorari in the above-entitled case was received on April 26, 1985 and is herewith returned inasmuch as you have not exhausted all remedies in the lower courts.

Please be advised that the time to file your petition in the above-entitled case begins to run when the Supreme Court of Arkansas disposes of a pending petition for review before that court.

Very truly yours,

ALEXANDER L. STEVAS, Clerk
By: /s/Edward L. Turner, Jr.
Edward L. Turner, Jr.
Assistant Clerk

vm.
Enc.

IN THE SUPREME COURT OF THE UNITED STATES
TERM OF OCTOBER, 1984

EARL BARNARD WILLIAMS ..... *Petitioner*
vs.
STATE OF ARKANSAS ..... *Respondent*

APPLICATION FOR EXTENSION OF TIME IN WHICH TO FILE PETITION FOR WRIT OF CERTIORARI

TO THE HONORABLE HARRY A. BLACKMUN, CIRCUIT JUSTICE:

Comes the Petitioner, Earl Barnard Williams, through his attorney, Darrell F. Brown, a member of the bar of this Court, and respectfully applies for an extension of Time in which to file a Petition for Writ of Certiorari.

1. Petitioner was convicted of Possession of a Controlled Substance with Intent to Deliver, and a previously given suspended sentence was revoked, in a trial in the Circuit Court of Pulaski County, Arkansas. The issue on appeal to the Arkansas courts was the refusal of the trial court to order the disclosure of the "confidential informant" whose information apparently caused the issuance of the search warrant.

2. The Arkansas Court of Appeals affirmed Petitioner's conviction by written opinion dated February 20, 1985. A copy of the opinion is attached to this Petition as an Exhibit. *Williams v. State*, CACR 84-124 (Ark. App. 4/6/85)

3. Petitioner's previous counsel did not file a Petition for Rehearing or Petition for Review by the Arkansas Supreme Court within the 17 days required under Arkansas procedural rules. A Petition for Rehearing was filed by previous counsel on March 29, 1985 and was denied April 24, 1985. A Petition for Review by the Arkansas Supreme Court was filed on April 25 by current counsel immediately after his employment by Petitioner. Copies of these pleadings, as well as those seeking recall of the mandate are attached hereto. (The Court of Appeals is the intermediate appellate court in Arkansas. There is only discretionary review by the Supreme Court for certain types of cases, including this.)

4. Disposition of the Petition for Review is currently pending in the Arkansas Supreme Court. It may develop that review may be granted by the Arkansas Supreme Court. Should the decision stand, however, Petitioner desires to seek certiorari to the United States Supreme Court. Considering that just over 60 days have elapsed since the rendering of the original appellate opinion in this case, Petitioner, through his newly employed counsel, does not wish to permit any more time to elapse in the event that his Arkansas proceedings were denied procedurally.

5. Petitioner is of the opinion that an extension of thirty days would be sufficient for the Arkansas court to rule and a certiorari petition to be prepared.

WHEREFORE, Petitioner respectfully prays that he be granted an extension of time in which to seek a writ of certiorari.

Respectfully submitted,

DARRELL F. BROWN & ASSOCIATES, P.A.
Attorneys at Law
One Union National Plaza, Suite 940
Little Rock, Arkansas 72201
(501) 376-1845

By: /s/DARREL F. BROWN
Darrell F. Brown
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a copy of the foregoing pleading was served on Attorneys of record for all other parties to this action, by placing same, properly addressed, in the United States Mail with sufficient postage to insure delivery this 25th day of April, 1985.

/s/DARRELL F. BROWN
Darrell F. Brown

DIVISION I

Arkansas Court of Appeals

No. CACR 84-124
Opinion Delivered February 20, 1985

APPEAL FROM PULASKI CIRCUIT COURT, FIFTH DIVISION

HONORABLE ANNABELLE CLINTON, JUDGE

AFFIRMED

EARL BERNARD WILLIAMS ..... *Appellant*
V.
STATE OF ARKANSAS ..... *Appellee*

MELVIN MAYFIELD, Judge

In June 1983 appellant pled guilty to the charge of possession of a controlled substance with intent to deliver and received a four-year suspended sentence. In August 1983 appellant was again charged with possession of a controlled substance with intent to deliver. A petition was filed to revoke his suspended sentence, and a trial for the substantive crime was consolidated with a hearing on the petition to revoke. Appellant was found guilty of the substantive crime, sentenced to serve four years in the Arkansas Department of Correction, and fined $500.00. His suspended sentence was revoked and he was sentenced to four years imprisonment to run concurrently with the sentence in the other case.

This second charge of possession with intent to deliver arose when a confidential informant contacted Officer Darrell Hall of the Little Rock Police Department and informed him that appellant was selling marijuana from his home. The informant offered to make a controlled buy from appellant; the officer agreed; and they proceeded to make two controlled purchases. Before each buy the informant came to the police department where he was searched for contraband and money. After the search, the officer would record the serial number of a $10 bill which he would give the informant, then Hall would take the informant to appellant's home, and the informant would get out of the car and go into the house. Each time the informant returned, within approximately five minutes, with a green vegetable substance that later tested out as marijuana.

Based upon the evidence of the two buys, Officer Hall obtained a search warrant for appellant's house. When officers attempted to execute the warrant, appellant was caught flushing green vegetable material down the toilet, and plastic bags containing marijuana were found in several places in the house. At the trial appellant argued that he did not even live in the house, and on appeal he argues that the trial court erred in denying his motion for discovery of the identity of the informant and in denying his motion to suppress the evidence obtained as a result of the execution of the search warrant.

Appellant bases his argument on case law which holds that when a confidential informant is an active participant in a transaction, it is error to withhold the

informant's identity from the defendant. In *Roviaro v. United States,* 353 U.S. 53 (1957), the United States Supreme Court stated:

> What is usually referred to as the informer's privilege is in reality the Government's privilege to withhold from disclosure the identity of persons who furnish information of violations of law to officers charged with enforcement of that law. *Scher v. United States,* 305 U.S. 251, 254; *In re Quarles and Butler,* 158 U.S. 532; *Vogel v. Gruaz,* 110 U.S. 311, 316. The purpose of the privilege is the furtherance and protection of the public interest in effective law enforcement. The privilege recognizes the obligation of citizens to communicate their knowledge of the commission of crimes to law-enforcement officials and, by preserving their anonymity, encourages them to perform that obligation.
>
> . . . .
>
> . . . Where the disclosure of an informer's identity, or the contents of his communication, is relevant and helpful to the defense of an accused, or is essential to a fair determination of a cause, the privilege must give way.
>
> . . . .
>
> We believe that no fixed rule with respect to disclosure is justifiable. The problem is one that calls for balancing the public interest in protecting the flow of information against the individual's right to prepare his defense. Whether a proper balance renders nondisclosure erroneous must depend on the

particular circumstances of each case, taking into consideration the crime charged, the possible defenses, the possible significance of the informer's testimony, and other relevant factors.

The Arkansas Supreme Court has considered this issue several times. In *Bennett v. State,* 252 Ark. 128, 477 S.W.2d 497 (1972), the prosecution presented an undercover investigator who testified that he went to appellant's apartment accompanied by two confidential informers, one of whom purchased drugs which the agent paid for. The Court stated:

> Generally, whether the privilege of nondisclosure of an informer's identity applies depends on whether the informer was present and participated in the alleged illegal transaction with which the defendant is charged, or whether the informer was "merely" one who supplied only a "lead" to law enforcement officers to assist them in the investigation of a crime. The identity of an informer is required in certain instances, particularly where he was present as a participant. [Citations omitted.] The rationale is that where the informer is a witness to an illegal transaction, his testimony could be relevant to amplify, modify, or contradict the testimony of a government witness and, therefore, essential to a fair determination of the cause.

More recently, in the case of *Jackson v. State,* 283 Ark. 301, 675 S.W.2d 820 (1984), the court again reviewed the question of when an informant's identity must be disclosed. The informant in *Jackson* had revealed to officers that appellant was selling marijuana from his home and that he, the informant, had made two

purchases from him. Relying on this information the police obtained a search warrant and discovered in the ensuing search enough contraband to convict appellant of possession of marijuana with intent to deliver, possession of valium, and possession of drug paraphernalia with intent to use. The court held:

> Appellant also contends the trial court should have ordered disclosure of the confidential informant's identity. In this case the charges did not include the actual delivery of a controlled substance, only the possession with intent to deliver. In *Bennett v. State*, 252 Ark. 128, 477 S.W.2d 497 (1972), we required disclosure when the defendant was charged with the sale of drugs and the informant actually participated in the crime. We have not required disclosure where a defendant was charged only with possession and the informant merely supplied information leading them to the issuance of the search warrant. [Citation omitted.]

Under the law, and in view of the facts of this case, we find no error in the court's refusal to require the disclosure of the identity of the informant insofar as the trial of this case was concerned. However, appellant also argues that the identity of the informant should have been disclosed because of the issue raised as to probable cause for the issuance of the search warrant. *United States v. Robinson*, 325 F.2d 391 (2nd Cir. 1963), is cited in support of this contention. We do not agree.

In *Robinson*, the issue was probable cause to arrest. The appellate court held that apart from the information furnished by the "special agent of the Government" the

police officers did not have enough information to have probable cause. Thus, the identity of the special agent was required so the defendant could examine him and elicit all relevant facts so the judge could pass upon the question of probable cause to arrest. This is not the situation here. In this case the strength of the officer's affidavit for issuance of the search warrant rested on his own knowledge. There was no need to examine the informant. In *Brothers v. State*, 261 Ark. 64, 546 S.W.2d 715 (1977), the court said:

> In *McCray v. Illinois*, 386 U.S. 300, 87 S.Ct. 1056, 18 L.Ed2d 62 (1967), the Supreme Court held that when the issue is not guilt or innocence, but probable cause for search, and the State relies in good faith on credible information supplied by a reliable informant, no due process right is violated by the assertion of informant's privilege.
>
> No confrontation clause violation occurred since the information supplied by the tipster was not used at trial. *See Cooper v. California*, 386 U.S. 58, 87 S.Ct. 788, 17 L.Ed.2d 730 (1967), and *McCray*, *supra*.

Appellant argues that he did not live in the house where the buys were made by the informant but the evidence that appellant did live in the house was overwhelming and the charges against appellant were not based on anything except what was disclosed by the search. Under these circumstances, we find the court did not err in refusing to order the disclosure of the identity of the informant or in refusing to suppress the evidence

obtained as a result of the search warrant.

Affirmed.

Corbin and Glaze, JJ., agree.